

NOT DESIGNATED FOR PUBLICATION
ARKANSAS COURT OF APPEALS

DIVISION II

No. CA 07-950

PENNY HARRISON

APPELLANT

V.

ARKANSAS DEPARTMENT OF
HUMAN SERVICES

APPELLEE

Opinion Delivered MARCH 5, 2008

APPEAL FROM THE MADISON
COUNTY CIRCUIT COURT,
[NO. JV 2007-30]

HONORABLE STACEY
ZIMMERMAN, JUDGE

AFFIRMED

JOHN B. ROBBINS, Judge

Penny Harrison appeals the adjudication of her three children as dependent-neglected. Her sole point is that there is insufficient evidence to support the finding. We affirm.

Harrison and Michael Ogden are the parents of the three children, C.O., born November 9, 1996; D.O., born August 14, 1995; and P.O., born November 12, 2001. It is unclear who the legal custodian was at the time this case arose. The children were in Ogden's care on May 2, 2007, when appellee Arkansas Department of Human Services (DHS) removed the children because of allegations that C.O. was being sexually abused by her father. An affidavit in support of DHS's petition for emergency custody stated that C.O. told the caseworker and a State Police investigator that her father made her place her hand upon his penis and masturbate him. The affidavit indicated that Harrison's whereabouts were unknown

at the time DHS exercised the hold on the children. DHS filed its petition on May 7, 2007, and an ex parte order granting emergency custody was entered the same day.

A probable-cause hearing was held on May 11, 2007, at which time the circuit court found probable cause for entry of the ex parte emergency order. The children remained in DHS's custody. The court noted that Harrison was late for the hearing, and it was concerned that Harrison was under the influence of illegal drugs. The probable-cause order required that Harrison refrain from using illegal drugs and to submit random drug testing.

The adjudication hearing was held on June 15, 2007. Melanie Brakeville, a child-abuse investigator with the Arkansas State Police, testified about her investigation and interview with C.O. She said that C.O. was very clear in recounting five separate instances of abuse. She said that C.O. was credible and consistent in her allegations and did not appear to be coached. As part of her investigation, Brakeville also interviewed D.O. and P.O., who recounted several belt whippings and that they watched pornographic videos. They also told Brakeville that they fended for themselves while with Ogden. Brakeville described the home as filthy and without running water. She said that there were dirty dishes and clothes all over the house, as well as dogs with fleas and ticks. She concluded her investigation with a true finding for sexual contact and environmental neglect.

Caseworker Denise Gibson recounted the history of DHS's involvement with the family dating back to 2000, most of which involved instances of inadequate supervision by Harrison. She also recounted the services provided by DHS, including referrals for drug-and-alcohol assessment and treatment and assistance with transportation, before opining that

further services would not assist the family. She said that Harrison only took one of four requested drug screens and that screen was positive for marijuana. She explained that Harrison could not take the other screens because of transportation problems but added that Harrison never asked for help with transportation.

Gibson also said that there was a history of C.O. not having the proper hearing aids and that this caused a regression. She said that there was a “grave concern” about C.O.’s ears and whether she had the proper, current hearing aids. She said that there has not been a true finding for medical neglect by Harrison. Gibson said she did not believe that the children could be returned to Harrison because Harrison could not care for them without a job or a place to live. She was also concerned about the positive drug test.

The circuit court ruled from the bench and gave very detailed findings. The court found that the three children were dependent-neglected within the meaning of the statute. The court noted that Harrison had been arrested for traffic offenses and allegations of possession of drugs; that she had not submitted to all of the requested drug screens; and that the one test she submitted to was positive. Harrison was further found to have neglected C.O. by not keeping C.O.’s appointments for her hearing aids and by not keeping C.O.’s ears and hearing aids clean, which resulted in sores and additional hearing and speech problems. The court suspended Harrison’s visitation with C.O. until Harrison could pass four random drug screens. Harrison was also ordered to submit to a drug screen immediately after court adjourned. An order containing these findings was entered on June 25, 2007. Harrison filed a timely notice of appeal.

We review the circuit court’s findings of fact de novo and will not set them aside unless they are clearly erroneous, giving due regard to the court’s opportunity to judge the credibility of the witnesses. *See Hopkins v. Ark. Dep’t of Human Servs.*, 79 Ark. App. 1, 83 S.W.3d 418 (2002). A dependent-neglected juvenile is one at substantial risk of serious harm as the result of, among other things, abuse or neglect. *See Ark. Code Ann. § 9-27-303 (18)(A)(ii) and (v) (Supp. 2007)*. Dependency-neglect must be proven by a preponderance of the evidence. *Ark. Code Ann. § 9-27-325(h)(2)(B) (Supp. 2007)*.

For her sole point, Harrison argues that there is insufficient evidence to support a finding that the children are dependent-neglected as defined by the code. We disagree.

Arkansas Code Annotated section 9-27-303(18)(A) defines a “dependent-neglected juvenile” in part as “any juvenile who is at substantial risk of serious harm as a result of . . . sexual abuse, . . . neglect, or parental unfitness to the juvenile, a sibling, or another juvenile[.]” In turn, *Ark. Code Ann. § 9-27-303(36)(A)(v)* defines “neglect” in part as including “those acts or omissions of a parent, . . . which constitute: . . . Failure to provide for the juvenile’s care and maintenance, proper or necessary support, or medical, surgical, or other necessary care[.]”

Harrison’s argument is that she did not cause the abuse or neglect of the children because they were living with their father at the time DHS took custody. She also argues that most of the failures cited by the circuit court are the result of her lack of transportation. In *Brewer v. Arkansas Department of Human Services*, 71 Ark. App. 364, 43 S.W.3d 196 (2000), this court explained that parental unfitness is not necessarily predicated upon the parent’s causing

some direct injury to the child in question. Clearly, a parent who fails to notice that a child is being sexually abused or protect that child from such abuse is unfit. *Id.*

We cannot say that the circuit court was clearly erroneous in finding the children dependent-neglected. First, Harrison's drug use and failure to address the problem renders her unable to properly care for the children. Contrary to Harrison's argument, it is not merely the one positive drug test that led the court to the conclusion that Harrison had a problem with drugs. There was the circuit court's belief that Harrison was under the influence at the probable-cause hearing, Harrison's subsequent arrest on other drug charges, the positive drug test, and the other missed drug tests without good cause. It is not just the time between when the children were taken into custody and the adjudication hearing that matters; instead, it is the entire picture of how Harrison discharged her parental duties that is relevant.

Second, although she admits that she missed some appointments concerning C.O.'s hearing aids, Harrison argues that the circuit court did not make a finding of medical neglect and asserted that the missed appointments did not rise to that level. A finding of medical neglect was not required in order to find that the children were dependent-neglected because the failure to keep the hearing aids clean and up to date means that Harrison failed to provide for C.O.'s needs. This also meets the definition for finding D.O. and P.O. dependent-neglected by virtue of Harrison's parental unfitness towards C.O.

Affirmed.

GLADWIN and HEFFLEY, JJ., agree.